

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(August 29, 1997 Session)

FILED

February 18, 1998

Cecil W. Crowson
Appellate Court Clerk

WALTER A. DICKMAN,) JACKSON CRIMINAL
)
Plaintiff-Appellee,) Hon. J. O. BOND,
) Judge.
v.)
) No. 01S01-9703-CC-00061
MEADOWS HOMES, INC.,)
)
Defendant-Appellant.)

For Appellant:

William B. Jakes, III
Alice Margaret Essary
Howell & Fisher
Nashville, Tennessee

For Appellee:

Charles W. McKinney
Richard Brooks
Gordonsville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

REVERSED AND DISMISSED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer, Meadows Homes, Inc., contends the evidence preponderates against the trial court's finding that the claimant was a covered employee and in favor of a finding that he was an independent contractor. As discussed below, the panel has concluded the claimant was an independent contractor.

On June 13, 1994, the claimant, Walter Dickman, and Meadows Homes, Inc., entered into the following:

CONTRACTOR AGREEMENT

I/We Walter Dickman do state that I/We are general contractors who are duly licensed to perform the services for which we are offering to Meadows Homes. Our services are being offered to the general public.

As a contractor, I/We provide our own commercial automobile, workmen compensation and liability insurance, and hereby release Meadows Homes from any and all liabilities concerning our contract and any employees and their properties.

As a contractor I/We agree to provide all necessary tools, equipment and transportation necessary to complete any services required.

As a general contractor I/We affirm that we are responsible to report and pay any local, state or federal taxes which may be due on income from services rendered.

The paper writing was dated and signed by the claimant and a representative of Meadows Homes, Inc.

Thereafter, Dickman bid on and was awarded work at property owned by Meadows Homes in Jackson County. Then, beginning on June 27, 1994, the parties agreed that he would be compensated on an hourly rather than a per job basis. He would perform the work, then bill Meadows for his time.

On July 6, 1994, he received an electrical shock while trying to repair an electrical problem, resulting in a third degree burn on his arm. On November 24, 1994, the claimant filed this action for workers' compensation benefits in Jackson County. On May 10, 1995, he filed a complaint for common law damages against the same defendant in another county. The second complaint is not part of this appeal.

The trial court found the claimant to be an employee and awarded workers' compensation benefits. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 59-6-225(e)(2). This panel is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

Generally, every employee of a covered employer is entitled to the benefits provided by the Workers' Compensation Act. Tenn. Code Ann. section 50-6-102(a)(3). However, an independent contractor, or one who contracts to perform a service by his own methods and without control or direction by his employer except as to the result to be achieved, is not a covered employee. Bargery v. Obion Grain Co., 785 S.W.2d 118 (Tenn. 1990); Cromwell General Contractors v. Lytle, 202 Tenn. 633, 439 S.W.2d 598 (1969).

Among the tests for determining whether the work relationship is that of employer-employee or of independent contractor are (1) right to control the conduct of the work, (2) right of termination, (3) method of payment, (4) whether or not the worker furnishes his own helpers, (5) whether or not the worker furnishes his own tools, (6) self scheduling of working hours and (7) freedom to render services to other entities. Tenn. Code Ann. section 50-6-102(a)(9)¹. But these tests are not absolute and must not be applied abstractly. Wright v. Knox Vinyl & Aluminum Co., 779 S.W.2d 371 (Tenn. 1989); Masiers v. Arrow Transfer and Storage Co., 639 S.W.2d 654 (Tenn. 1982). None of these tests, standing alone, is conclusive. Boruff v. CNA Ins. Co., 795 S.W.2d 125 (Tenn. 1990); Curtis v. Hamilton Block Co., 225 Tenn. 275, 466

¹ **50-6-102. Definitions.** -- (a) As used in this chapter, unless the context otherwise requires:

(9) In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:

- (A) The right to control the conduct of the work;
- (B) The right of termination;
- (C) The method of payment;
- (D) The freedom to select and hire helpers;
- (E) The furnishing of tools and equipment;
- (F) The scheduling of working hours; and
- (G) The freedom to offer services to other entities.

S.W.2d 220 (1971). While the primary test for determining whether an injured worker is an employee or independent contractor is "right to control," it is not the sole test. Lindsey v. Smith & Johnson, Inc., 601 S.W.2d 923 (Tenn. 1980).

The written "Contractor Agreement" between the parties defines the rights and obligations of the parties. The claimant does not dispute that but argues it was changed when he agreed to be paid by the hour. We find nothing in that paper writing concerning the method of payment. Moreover, it is noteworthy that Meadows did not withhold taxes or social security from his pay. Moreover, on his 1994 Individual Income Tax Return, the claimant reported his income from Meadows as self-employment income and reported his business as "construction: remodeling;" and he deducted business expenses of more than \$11,000.00 for his car and truck, office and telephone expenses and supplies.

Mr. Dickman testified that he reported to work for Meadows at a particular time, but the preponderance of the proof is that he set his own hours and came and went as he pleased. He regularly submitted invoices under the name of "Dickman & Associates Home Maintenance/ Contractor." He furnished his own tools and was free to offer his services to others.

From a deliberate consideration of all those circumstances, the panel finds the evidence to preponderate against the finding of the trial court and in favor of one that he was an independent contractor. As such he is not a covered employee. The judgment of the trial court is reversed and the case is dismissed. Costs are taxed to the plaintiff-appellee.

Joe C. Loser, Jr., Special Judge

CONCUR:

Frank F. Drowota, III, Associate Justice

William H. Inman, Senior Judge

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	(
MEADOWS HOMES, INC.,	(
	(
Defendant-Appellant.	(REVERSED AND DISMISSED.

JUDGMENT

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This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the plaintiff-appellee, for which execution may issue if necessary.

IT IS SO ORDERED this 18th day of February, 1998.

PER CURIAM

Drowota, J. - Not participating.